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June 8, 2023

Re: Changes Under Consideration to Discretionary Institution Practices, Petition Word-Count Limits, and Settlement Practices for America Invents Act Trial Proceedings Before the Patent Trial and Appeal Board, Docket No. PTO-P-2020-0022-0001.

Dear Under Secretary Vidal:

As the President and CEO of the New Hampshire Retail Association, I am writing to ask that you consider the needs of our state's retailers as you craft rules that could impact the post grant review (PGR) process. Businesses in New Hampshire rely on post grant review to protect them from frivolous patent lawsuits, and attempts to weaken the PGR or Inter Partes Review (IPR) processes will cost our members time and money that could be used to foster growth in our state. The recently announced Advanced Notice of Proposed Rulemaking threatens exactly that, and on behalf of our members, I ask that you reconsider these proposed rules.

The New Hampshire Retail Association is made up of more than 700 of our state's retailers, including both independent, regional and national retailers. 95 percent of our members are New Hampshire based retailers, and many of them have faced a gamut of possible challenges over the last year. From COVID precautions, to supply chain issues, to rising inflation rates, to chronic labor shortages, our members have overcome tough odds to continue to provide goods and services to the people of the Granite State. At a time when some of our members are just beginning to see the light at the end of the tunnel, weakening the IPR process will signal to non-practicing entities (NPEs, sometimes known as "patent trolls") that it is open season on small businesses.

As you know, there are some bad actors out there who want to abuse the patent system – buying up old, vague patents from the earliest days of the internet, and using them to threaten or sue small businesses for alleged "infringement." While most of these cases would easily fail in a real legal challenge, for small businesses it is significantly less expensive to settle out of court with a troll than it would be to go through an expensive trial. NPEs count on this, and can use the same old patent to extort thousands and thousands of dollars from retailers and other Main Street companies.

Congress took action to address the problem of patent trolls in 2011, with the passage of the *America Invents Act*, which established the IPR process. With IPR, anyone can bring a challenge to an old patent, to get it looked at again by the Patent Trial and Appeal Board (PTAB) and confirm it is up to standard. Because the AIA allows for anyone to file an IPR, our smaller members can file an IPR themselves, or benefit from an IPR filed by a larger corporation.

Unfortunately, the ANPRM, as drafted, puts the IPR process at risk. The proposed rules risk making it impossible for many companies to file an IPR. Additionally, there are elements of the proposed rules that directly contradict the AIA as passed by Congress, including: establishing a shorter deadline for filing an IPR than exists in the AIA; increasing the standard for instituting a review; and creating new rules on who can even file an IPR.

Our members rely on the process Congress created as part of the AIA to help protect them from baseless patent lawsuits. We ask that you reconsider the ANPRM, so that New Hampshire's retail community can continue to rely on established patent law as created by Congress.

Sincerely,

A handwritten signature in black ink, reading "Curtis F. Picard". The signature is written in a cursive style with a large, stylized "C" and "P".

Curtis Picard, CAE
President and CEO